Supreme Court, U.S.
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No. 03-637

In the Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The government does not dispute that this case presents an issue of national importance. The Fourth Circuit's interpretation of the Clean Water Act to grant the federal government authority over "any branch of a tributary system that eventually flows into a navigable body of water" (Pet. App. 16a), has such far-reaching impact that no less than fifteen *amicus curiae* briefs have been filed urging this Court to review the Fourth Circuit's stance.[1] *Amicus* briefs have been filed by individual citizens, a member of congress, state agencies, local development authorities, drainage associations and organizations representing such diverse interests as oil producers, developers, farmers, miners and independent businesses. As we demonstrated in the petition and the government has not refuted, the Fourth Circuit's decision should be reviewed by this Court because it (i) has been squarely rejected by another Circuit Court of Appeals, (ii) is contrary to the plain language and legislative history of the CWA and this Court's teachings, and (iii) raises serious constitutional questions.

As the government concedes (at 15), the Fifth Circuit has soundly rejected the Fourth Circuit's interpretation. In the Fifth Circuit, "the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like." *In re Needham*, 2003 U.S. App. LEXIS 25318 at *10 (5th Cir. December 16, 2003). The Fifth Circuit correctly recognizes that this Court in *SWANCC* determined that the

[1] Five *amicus* briefs have been filed in this case and another ten have been filed in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. petition pending, No. 03-701 (filed Nov. 10, 2003). The *Deaton* case, which was also decided by the Fourth Circuit, presents a similar question regarding the scope of the Corps authority pursuant to the CWA.

legislative intent of the Clean Water Act was to regulate navigable waters and those waters that have a "significant nexus" and are "inseparably bound up with" navigable waters--which do not include "roadside ditches" like those at issue here.

By contrast, the Fourth Circuit allows the Corps to exercise regulatory authority based upon the mere possibility of any connection with navigable waters, regardless of how fleeting, tenuous or hypothetical the connection may be. In this case, the district court, after making detailed factual findings, concluded that the Corps had "not carried its burden of factually proving a sufficient connection between the wetlands on the Property and navigable waters or waters of the United States." Pet. App. 45a. The district court detailed the path water would have to take from the Property before reaching navigable water, and noted that the Corps presented "no evidence of the frequency or volume of the surface water runoff." Pet. App. 29a. The Fourth Circuit accepted all of the district court's factual findings. Therefore, the Fourth Circuit's holding allows the Corps to assert CWA regulatory jurisdiction without *any* proven actual nexus with navigable water.

The Fifth Circuit's decisions in Rice and Needham directly conflict with the Fourth and Sixth Circuit Courts of Appeals. The government concedes that the Fifth Circuit's interpretation of the OPA applies equally to the CWA. U.S. Br. 14. In *Rice,* the Fifth Circuit held that the government failed to establish jurisdiction because there was "no detailed information about how often the creek runs or about how much water flows through it." *Rice v. Harken*, 250 F.3d 264, 270-271 (5th Cir. 2001). In this case, the Fourth Circuit upheld jurisdiction without overturning the district court's finding that there "is no evidence of the frequency or volume of the surface water runoff." Pet. App. 29a. Similarly, the Sixth Circuit recently reinstated a criminal conviction for a violation of the CWA based upon

the mere *possibility* that water *could* flow from the defendants' property to navigable water. *United States* v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003), cert. petition pending, No. 03-929 (filed Dec. 30, 2003). The Circuits are undeniably split: the Fifth Circuit, *at a minimum*, requires evidence to evaluate the "sufficiency" of a connection; the Fourth and Sixth Circuits do not.

The government erroneously claims that the Fifth Circuit's decision in *Needham* was based on the "downstream effects" of an oil spill. U.S. Br. 16. In fact, the Fifth Circuit relied on the parties' stipulation that "oil was discharged from the Thibodeaux facility into Bayou Cutoff and Bayou Folse." *Needham*, 2003 U.S. App. LEXIS at *12. It was undisputed that Bayou Folse was "adjacent to an open body of navigable water, namely the Company Canal." *Id.* at *13. Thus, the Fifth Circuit required the government to prove a discharge of oil into "waters of the United States," which the Fifth Circuit held only included "navigable-in-fact waters" or "non-navigable waters (or wetlands) that are truly adjacent to an open body of navigable water." *Id.* at 17. In this case the *only* discharge alleged by the government was on the Newdunn Property. Pet. App. 32a. The government did not allege, nor prove that *any* pollutant was discharged into (or adjacent to) *any* traditional navigable water.

Limiting the Corps' § 404 jurisdiction, as Congress intended, would not subvert the goals of the Clean Water Act. Section 404 authorizes the Corps to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites. 33 U.S.C. § 1344. Other sections of the Act regulate discharges from point sources, such as roadside ditches, at the point where they discharge into navigable waters. 33 U.S.C. § 1342 (CWA § 402) (prohibiting discharges of pollutants from point sources) and § 1367 (defining ditches as point sources). Congress made the decision to address the effects of pollution flowing through roadside ditches by regulating them at the point

where the ditches flow into navigable water. CWA § 402; see also *Amicus Curiae* Brief of the Honorable John J. Duncan, Jr., *Deaton*, No. 03-701. As Representative Duncan explains, the Clean Water Act expressly allows states and municipalities to determine the best way to control the pollution that enters into the system of roadside ditches, culverts and drains that make up a municipal separate storm sewer system ("MS4"). Federal concerns are only implicated where the point sources discharge into navigable waters. Representative Duncan expresses concern that the Fourth Circuit's decision in *Deaton* "could" cause MS4's to be considered "waters of the United States", a result which would "completely upset" the legislative intent of the CWA. *Id.* at 7 n.7.

Representative Duncan's fears have been realized in this case. The ditches that the Fourth Circuit deemed "waters of the U.S." are, in fact, part of an MS4 operated by the City of Newport News and the Virginia Department of Transportation. Stip. Trial Ex. 7. The Fourth Circuit has completely upset the local/federal balance of the CWA and ruled as a matter of law that *all* MS4's that discharge into navigable waters are themselves 'waters of the United States.' If the Fourth Circuit's decision is not reversed, MS4's would no longer be regulated at the point of discharge into navigable waters. Instead, all water in municipal sewer systems would be required to meet the water quality standards set forth in the CWA. The legislative intent of § 402 would be defeated.

If this Court were to reverse the Fourth Circuit and hold that non-navigable ditches are not waters of the United States, the environmental protection provided by § 402 would be unaffected. Pursuant to § 402, Municipalities (and other MS4 operators) are charged with developing their own policies for discharges *into* MS4's provided discharges *from* MS4's meet certain quality standards. Congress intended to preserve and protect the rights of states and localities to make

land use decisions and balance competing local interests. Congress, therefore, chose to regulate only the point of discharge into navigable waters. Federal policies and goals of pollution prevention are completely protected if each section of the CWA is allowed to operate as Congress intended. Conversely, adopting the governments' theory of CWA jurisdiction would eviscerate state and local governments' power over land use decisions.

This Court's consideration is necessary because of the hopeless confusion exhibited by the government. The varying arguments made in this case alone demonstrate that the regulating agencies have no clear idea as to the proper scope of the Clean Water Act. The government's theory has changed with each successive agency assigned to this case. The Corps, Department of Justice trial counsel, Department of Justice appellate counsel and the Solicitor General have each asserted a new theory of jurisdiction.

Prior to trial in this case, the Corps asserted jurisdiction solely on the basis that the Newdunn Property was "adjacent" to Stony Run, which it argued was a tributary to the Warwick River, a navigable water of the U.S. Stip. Trial Ex. 4. Stony Run is 2.4 miles from the Newdunn Property. Pet. App. 30a–31a. At trial, "the Corps' [through DOJ trial counsel] claim of jurisdiction [was] based *solely* upon the alleged surface water or hydrological connection of the Property to the navigable portion of Stony Run." Pet. App. 29a–30a (emphasis added). On appeal to the Fourth Circuit, DOJ appellate counsel for the first time argued that the ditches were "tributaries" because they exhibited an Ordinary High Water Mark. See Opening Brief of the United States 27. Indeed the government included the OHWM in its question presented to the Fourth Circuit. DOJ appellate counsel argued extensively that the existence of an OHWM was the *sine qua non* of CWA jurisdiction. See *id.* at 2, 13, 15, 27, 47-48, 52-53, 56; and Reply Brief of the United States at 23-26. In response, *Newdunn* extensively controverted the

Corps' fallacious arguments regarding ordinary high water marks. *See Newdunn*'s Brief at 4, 6-7, 48-52.[2] Incredibly, the government now contends that "Petitioners did not make [an OHWM] argument in the court of appeals, and further review is unwarranted for that reason alone." U.S. Br. 18. The confusion surrounding CWA jurisdiction has reached the point that the government has lost track of its own arguments. Further review is *warranted* for that reason alone.

In response to *Newdunn*'s Petition, the government (now represented by the Solicitor General) has abandoned its ordinary high water mark argument. Having apparently exhausted its theories, the government returns to its "surface water connection" theory.[3] However, as noted by the district court, the term "surface water connection" is not contained in the Act or the regulations. Furthermore, even the government acknowledges that not *every* surface water connection is sufficient and argues instead that a decision must be made on a case-by-case basis.

Assuming, without for a moment conceding, that the Clean Water Act permissibly grants the Corps the discretionary authority to decide on a "case-by-case basis" whether federal jurisdiction is appropriate, U.S. Br. 19, the Corps must, at a minimum, be able to justify its decision in a court of law. The government concedes that "judicial

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[2] The concept of an ordinary high water mark also played a central role during oral argument. See Fourth Circuit Oral Argument Transcript at 5-7, 10, 22-24, 38-39.

[3] Further distorting the record, the government now pretends that the question presented to this Court is the status of ditches that re-route "pre-existing natural surface hydrologic connections." U.S. Br. I. *That* question was not presented to the Fourth Circuit and the trial court made *no* factual finding that such a connection ever existed.

review" is appropriate but seemingly argues that such "judicial review" is *only* appropriate under the APA. *Id.* at 21. There is no support for such a suggestion.

In addition to justifying its administrative decisions, the Corps *must* be able to prove jurisdiction when it files an action to enforce the CWA. The district court found that the Corps failed to prove jurisdiction in this case. The district court's factual findings are extensive and must be afforded great weight. None of the Judge's factual findings were overturned or even questioned by the Court of Appeals. Therefore, if jurisdiction may be determined on a case-by-case basis, the district court's factual determination in this case, that "the Corps has not carried its burden," Pet. App. 45a, must stand.

The mere assertion of CWA jurisdiction has direct and concrete consequences on a landowner. The government's protestations (at 12) that there is no need to be concerned about the scope of its jurisdiction because after exercising jurisdiction it may choose to issue a permit ignore both the limits Congress imposed on federal power in the Act and the huge burdens on landowners once caught in the grip of Section 404. Section 404 of the CWA only requires citizens to obtain permits to discharge dredged or fill material into navigable waters. 33 U.S.C. § 1344. The Corps has no authority to compel all landowners to submit to the Corps' administrative process in order to evaluate whether jurisdiction exists.

The administrative process is extremely long (for example, the agency in *SWANCC* pursued the process for 15 years) and extremely burdensome (the administrative record in *SWANCC* consisted of a staggering 47,000 pages that cost several million dollars to compile). See also Rapanos *Amicus* Br. 10. If the Corps ultimately grants a permit, mitigation for impacts to wetlands is mandatory and can cost a landowner up to $85,000 per acre of wetland impacts.

Landowners are entitled to clear guidance to determine when they are subject to these onerous governmental restrictions.

Not only is clear guidance unavailable, but the Corps ignores the guidance that does exist. For example, in January 2003, the EPA and Corps issued guidance stating that, in light of *SWANCC*, the agencies "are now precluded from asserting CWA jurisdiction" over such waters as "pocosins." EPA & Corps, *Guidance for Asserting Federal Jurisdiction Over Isolated Wetlands in Response to U.S. Supreme Court Decision in SWANCC Case,* 68 Fed. Reg. 1991, 1995 (Jan. 15, 2003). Yet, the government appears in this Court asserting its jurisdiction over what its own expert stated at trial was "very typical of what we call a Poquoson [sic] a swamp on a hill." Tr. 297. The confusion that now reigns is not the result of "stray language" by administrators (U.S. Br. 20) but of uncertainty in all quarters as to the most basic question of the scope of Section 404 jurisdiction. Landowners have no hope of discerning an intelligible principle guiding the Corps' jurisdiction from the existing muddle of conflicting caselaw and agency pronouncements.

This matter is ripe for review. The Fourth Circuit's decision concludes that Newdunn's property is subject to the CWA. All other elements of the alleged violation have been established and affirmed by the Fourth Circuit. The only matter left for the district court on remand is the determination of an appropriate fine and formal entry of judgment. Unlike the cases cited by the government, U.S. Br. 9, this case has not been remanded to formulate plans or make findings that could eliminate any need for review. Here, the case is complete, and the ruling below final, as to the critical legal issues presented in the petition. The mere determination of the government's remedy has no bearing on those issues and provides no reason to delay addressing a circuit split on an important question affecting, as *amicus* briefs demonstrate, many different interests across the Nation. See *Braxton v. United States*, 500 U.S. 344 (1991)

(granting certiorari after circuit court's remand for sentencing); *Newton v. Rumery*, 480 U.S. 386 (1987) (granting certiorari after circuit court's remand); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 277 (1987) (same).

Certiorari will be granted when "the importance of the question involved, the necessity of avoiding conflict between [the] Courts of Appeal ... or some matter affecting the interests of this nation in its internal [ ] relations, demands such exercise." *Forsyth v. Hammond*, 166 U.S. 506, 515 (1897). We have demonstrated the national importance of the issues and the depth of the conflicts presented in this case. The Fourth Circuit Court of Appeal's ruling is erroneous and should be reviewed by this Court at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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